COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1286

COMMONWEALTH

vs.

ABDIRAHMAN HUSSIEN NOOR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the District Court, the defendant, Abdirahman Hussien Noor, was convicted of one count of breaking and entering at night with intent to commit a felony, and one count of larceny in a building. Prior to trial, a judge had ordered dismissal of so much of the latter count as alleged conduct in a building, but the trial proceeded on the count as originally appearing. On appeal, the defendant contends that proceeding to trial on the original count constituted a violation of G. L. c. 263, § 4, the Sixth Amendment to the United States Constitution, and art. 12 of the Declaration of Rights of the Massachusetts Constitution, warranting vacatur of both his convictions. He further asserts that he received ineffective assistance of trial counsel. We vacate the judgment as to larceny in a building, order that the

verdict be reduced to misdemeanor larceny, and remand for resentencing. We otherwise affirm.

Background. The jury could have found as follows. On June 30, 2013, at around 4:15 A.M., Brookline Police responded to a call that a house sitter in Brookline "heard noises downstairs and thought somebody was inside the house." The police arrived at the house, and, while conducting a perimeter sweep, observed that a window at the rear of the house was ajar. Sergeant Robert Disario used a flashlight to look into the window and "observed a male figure come into the room very quickly and turn around, and go in the opposite direction." A different officer saw the defendant "open the [front] door, and start to walk out the door." The officer drew her weapon and ordered the defendant to stop and show his hands, at which point he retreated into the house. The police dispatcher updated the responding officers that the house sitter saw the defendant on the third floor, trying to climb out of a window. The officers found the defendant crouched behind a chair in a room on the third floor and took him into custody.

The police searched the defendant and found various items in his pockets including an antique pocket watch, approximately

six pairs of cufflinks, and a bracelet. All of these items belonged to the victim.[1]

The defendant told the police, after receiving Miranda warnings, that he had been drinking alcohol on Landsdowne Street in Boston and was returning home with his friends when he decided to urinate behind trees. He stated that upon returning to Powell Street, his friends were gone, so he thought they had entered 46 Powell Street. The defendant said that he knocked on the door to the house and, when no one answered, went to the back of the house and entered through a window. He told the police that he entered the home because "it's Brookline, and it's easy."

On July 1, 2013, a complaint issued from the Brookline Division of the District Court Department, charging the defendant with unarmed burglary, G. L. c. 266, § 15 (count one), and larceny in a building, G. L. c. 266, § 20 (count two). In October 2013, count one was amended to breaking and entering at night with intent to commit a felony, G. L. c. 266, § 16.[2] In October 2014, the defendant moved to dismiss count two. After a hearing the motion judge, in a margin endorsement, allowed the

[1] The victim testified that the pocket watch belonged to his great-great-grandfather, who "was a slave who escaped and joined the Union Army." The victim did not know the defendant and did not authorize the defendant to be in his home.

[2] Both the complaint and the docket appearing in the record appendix show the amendment of count one by handwritten notations.

motion as to "that [p]art of [c]ount [two] which alleges in a [b]uilding," but denied the motion in part such that the "charge of [l]arceny by [s]tealing[, G. L.] c. 266, § 30[,] stands."[3] However, on July 28, 2015, the day of trial in the Dedham Division of the court before a second judge, the clerk, evidently confused by the state of the docket (see note 3, supra), inquired what count two was charging. The prosecutor and defense counsel agreed that count two was the original count of larceny in a building.[4] Trial commenced on that basis, and the jury found the defendant guilty of count one as amended and of the original count two, larceny in a building. The judge sentenced the defendant to two eighteen-month concurrent sentences in the house of correction.

Discussion. 1. Uncharged crime. The defendant argues that he was wrongfully "tried and convicted of a crime for which there was not a charge." The Commonwealth concedes that "the defendant's conviction for larceny in a building should be vacated," and asserts that "the case should be remanded . . . for entry of conviction on the lesser-included offense of

[3] The complaint appearing in the appendix does not show an alteration to count two. The first page of the docket in the appendix contains a handwritten notation that count two was "amended" to larceny, but the second page of the docket (where the disposition and sentence on each charge are typically recorded) is not so annotated. Nor is there a separate docket entry showing the order on the motion to dismiss.

[4] Trial counsel apparently held the mistaken belief that his motion to dismiss count two had been denied in full.

misdemeanor larceny under G. L. c. 266, § 30 (1), and resentencing." We agree.

Where, as here, a defendant did not object to the error at trial, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. Burnett, 428 Mass. 469, 475 (1998); Commonwealth v. Bynoe, 49 Mass. App. Ct. 687, 693 (2000). See also Commonwealth v. Chase, 433 Mass. 293, 299 (2001), citing Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

Here, the defendant's conviction of the offense of larceny in a building violated G. L. c. 263, § 4,[5] and created a substantial risk of a miscarriage of justice. However, misdemeanor larceny is a lesser included offense of larceny in a building. See Commonwealth v. Sollivan, 40 Mass. App. Ct. 284, 287 (1996) ("Since larceny is necessarily included in the offense of larceny in a building, it is properly considered a lesser included offense"). See also Commonwealth v. Barklow, 52 Mass. App. Ct. 765, 768 (2001) (same). Furthermore, the evidence of larceny in the present case was overwhelming, and effectively undisputed. Moreover, the defendant does not claim, nor could he, that he had insufficient notice of the underlying

[5] General Laws c. 263, § 4, provides in relevant part that "[n]o person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court." Here, despite deficient record-keeping, it is clear that at the time of trial count two of the complaint charged larceny only.

larceny charge. In the particular circumstances presented, the appropriate remedy is to remand the case to the District Court for reduction of the verdict to the lesser included offense of misdemeanor larceny and for resentencing.[6] See Commonwealth v. Garrett, 473 Mass. 257, 266-267 (2015) (remanding for sentencing on lesser included offense where jury convicted defendant of crime "despite insufficient evidence of a required element, but 'the remaining untainted elements include all the elements of a lesser included offense'" [citation omitted]); Commonwealth v. French, 462 Mass. 41, 49 (2012).[7]

2. Ineffective assistance of counsel. The defendant also argues that defense counsel's agreement to going to trial on the original count of larceny in a building constituted "inattention to the case" that deprived him of "effective assistance of counsel without necessity for any further showing of prejudice," entitling the defendant to a new trial on both counts. In particular, he contends that defense counsel's performance

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[6] The Commonwealth properly concedes that it did not prove that the value of the stolen items was more than $250, which is required for a felony conviction under G. L. c. 266, § 30 (1).

[7] The defendant's claim of structural error is also unavailing. The claim was not timely raised, and such a claim "can be waived in some circumstances." Commonwealth v. Weaver, 474 Mass. 787, 814 (2016). See Burnett, 428 Mass. at 475 ("even structural error is subject to the doctrine of waiver"); Bynoe, 49 Mass. App. Ct. at 693 (no structural error even though defendant convicted of uncharged crime of use of motor vehicle without authority, on judge's erroneous instruction that unauthorized use was lesser included offense of charged crime of receiving stolen property).

affected his defense to count one, breaking and entering at night with intent to commit a felony. We disagree.

We review a claim of ineffective assistance of counsel to determine whether there was "serious incompetency, inefficiency, or inattention of counsel" that "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). See E.B. Cypher, Criminal Practice and Procedure § 63:50 (4th ed. 2014 & Supp. 2019). "The preferred method for raising claims of ineffective assistance of trial counsel is through a motion for a new trial." Commonwealth v. Davis, 481 Mass. 210, 222 (2019). "Relief may be afforded on such a claim [on direct appeal] 'when the factual basis of the claim appears indisputably on the trial record.'" Id., quoting Commonwealth v. Gorham, 472 Mass. 112, 116 n.4 (2015).

On the record before us, the defendant has failed to satisfy the second Saferian prong. See Davis, 481 Mass. at 223 ("On this record, the defendant's claim of ineffective assistance is not indisputable"). Without a motion for a new trial supported by an affidavit, we have no basis to assess how defense counsel's awareness of the partial dismissal of count two could have affected the defense on either count.[8] See

[8] Regarding the conviction of breaking and entering at night with intent to commit a felony, there was overwhelming evidence of

Commonwealth v. Gilman, 89 Mass. App. Ct. 752, 761 (2016). Furthermore, in view of the strength of the Commonwealth's case, we discern no prejudice to the defendant, particularly in view of our decision to reduce the verdict for larceny in a building. See Davis, 481 Mass. at 222.

3. Conclusion. On the first count of the complaint, the judgment is affirmed. On the second count of the complaint, the judgment is vacated and the guilty verdict of larceny in a building is reduced to misdemeanor larceny. The case is remanded for resentencing, preferably by the trial judge.[9]

So ordered.

By the Court (Vuono, Maldonado & Neyman, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: July 15, 2019.

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the breaking and entering elements of the crime. See Commonwealth v. Johnson, 91 Mass. App. Ct. 296, 308 (2017). The evidence of intent to commit a felony was likewise overwhelming, in view of the presence of the stolen items in the defendant's pockets, his admissions, and his attempt to hide from the police. See Commonwealth v. Soares, 51 Mass. App. Ct. 273, 278 (2001) (reasonable for jury to infer, absent contrary evidence, that person who breaks and enters at night intends to steal).

[9] The judge may, but need not, resentence on count one as well as count two.

[10] The panelists are listed in order of seniority.